No. 249. 39.
Brief of MacFarland for Libellants.
249

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

Filed Mar. 5, 1897.

WILLIAM W. BRAUER ET AL.,
Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA,
Respondent.

BRIEF ON BEHALF OF LIBELLANTS.

MACFARLAND & PARKIN,
Proctors for Libellants.

W. W. MACFARLAND,
Of Counsel.

Supreme Court of the United States.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and the RELIANCE MARINE INSURANCE COMPANY, Limited,
Libellants,

AGAINST

COMPANIA de NAVEGACION LA FLECHA,
Respondent.

BRIEF ON BEHALF OF THE LIBELLANTS

Statement.

A "cattle contract" was signed on the 10th day of October, 1891, between H. Maitland Kersey, acting on behalf of the libellants, Brauer & Co., which is set out in the record at page 173, for the transportation of 165 head of live cattle from New York to Liverpool. The cattle were shipped and a bill of lading was signed on the 24th day of October (pp. 136, 137) on which day the ship sailed. The following brief narrative of subsequent events is taken from the testimony of respondent's witnesses in order that certain facts, perhaps not altogether irrelevant may appear without reference to conflicting evidence. Fine weather prevailed until the 30th of October, when the wind began to freshen, increasing somewhat on the 31st, when at 2.30 P. M. of that day, the ship was stopped and lay "*crosswise* to the wind and sea," in other words, in the trough of the sea; (pp. 46, 17, 32) in this position, the engineer says, "we were perfectly still" (p. 9). Down to this time the ship had pro-

ceeded at full speed (p. 11); there had been some slight structural damages to the cattle pens caused by the sea, but it was repaired, and at 5 P. M. of the 31st, the cattle were in their pens (pp. 60, 31, 32, 24, 21). But at that hour gangways were opened (p. 22), as the first officer says, "so that in case the sea should be worse the decks would be free to carry over the cattle" (p. 29), which were brought to the gangway (p. 35). Of the weather, at the time the decision to let the cattle go over was reached, the Captain says, "I could not tell whether the storm was coming on or not precisely" (p. 127). "At this time of the year you cannot appreciate exactly when a storm is coming on" (p. 128). At the time of opening the gangways for the cattle to go over they were uninjured" (pp, 46, 28, 29). One of the cattlemen in his testimony for the libellants says, that in order to get the cattle over, the crew cut their ropes and knocked down the pens (p. 73). It does not appear that the storm increased in severity the night of the 31st, as the Captain feared might be the case, and the next morning many cattle still remained on board, notwithstanding the opening of the gangways the night before, but many were injured from their treatment, of course; in fact the boatswain says, "the strength of the storm was from the 31st and the 30th." It is to be observed that the state of things in respect to the cattle, existing on the ship on the morning of the 1st of November was the direct and natural result of the Captain's deliberate purpose to destroy them and his efforts to that end the night before; a fact that Judge Wallace does not appear to take into account in his dissenting opinion. Reference to a few facts stated by the respondent's witnesses will show that the learned Judge somehow or other obtained a curiously erroneous idea of the state of the weather on the morning of November 1st. One circumstance demonstrates this. Among the crew was a boy named Enchortiata; (p. 43), that morning he fell overboard, he had on rubber clothing, and could not swim; sailors were able to stand on the rail and throw him a line a distance of some three fathoms, and the captain threw to him a life preserver from the bridge, and after being in the water some fifteen minutes he was hauled on board (pp. 43, 46; p. 19, fol. 76; p. 24, fols. 94, 95).

That morning the crew were able to perform all their usual duties, and by eleven o'clock the ship had been cleared of the cattle that had been condemned to the sea, and breakfast was served in the usual manner (fols. 77, 117, 167). Moreover, it is decisive on this point that the ship took in no water through the numerous openings, received no damage from the sea, nor does it appear any one of the many movable articles there must have been about the deck were even disturbed. Doubtless it might have been more or less difficult in the morning to distinguish cattle still in a condition to be saved from those that could not be, by reason of their injuries; but there was no intention, and therefore no attempt to do that, they had been all doomed the night before, consequently the respondent, rather than the libellants, should suffer from any obstacles in making proof thus occasioned. Nevertheless it is plain that the libellants were in fact prejudiced by the difficulties so created, but perhaps unavoidably under the circumstances. Certainly the respondent was not in a situation to complain on this point. Out of the whole number shipped all but 38 head of cattle were thus destroyed, with the exception of one lost by an accident. As to many details the witnesses for the respondent contradict themselves and each other, but as only questions of law are brought up, it would not be profitable to go into the evidence further than needful for an explanatory introduction, and for that purpose the main facts are presented in the above outline.

Argument.

I.—*The terms of the bill of lading.*

The only provisions of the bill of lading that can have any possible relevancy are the following (p. 136): (1) "On deck at owner's risk; steamer not to be held accountable for accident to or mortality of the animals from whatever cause arising;" (2) "the carrier shall not be liable for loss or damage occasioned by causes beyond his control;" (3) "by perils of the sea;" (4) "by accidents of navigation, even if occasioned by negligence." As to the first, it can only mean that the owner assumes the *normal* risks to which a deck cargo of that character is necessarily subject, and neither those words, nor those exempting the steamer from accident to or mortality of the cattle can be rationally held to exempt the steamer from liability for the destruction of the cattle by a wrongful jettison; that was not the "mortality" contemplated. As to the second, the word "carrier" here embraces the agents of the ship owner engaged in transportation, and it has been determined as matter of fact that the loss was not occasioned by causes beyond the carrier's control. The same may be said of the third, it having been established that the loss was not due to a peril of the sea. As to the fourth, it has been found and decided that the loss was not due to an "accident of navigation" but resulted from a wrongful jettison of cargo; and the word "*negligence*" refers only to *accidents of navigation* of which the words "collision" and "stranding" are given as types. The argument for the respondent, therefore, can find no support in any of the above provisions of the bill of lading, nor is understood to be founded upon them, but on the following clause, namely, "Also that this contract shall be governed by British law, with reference to which this contract is made." The position of this clause in the bill of lading is so pecaliar that the original bill of lading was sent up as part of the record. Upon inspection it will be seen to have been stamped on the paper as something extraneous and is so obscure as to be scarcely legible.

II.—*Relevancy of the reference to British law.*

The proposition of the respondent is, that if British law were to be taken as a rule of decision, the libellants could not recover because British law upholds stipulations in bills of lading to the effect that a carrier shall not be liable for *loss of cargo occasioned by the negligence of master or mariners.* Suppose that to be so, then the answer is, that as shown above, *there is no such stipulation in this bill of lading.* It will hardly be contended that British law *implies* such provisions in bills of lading or *proprio vigore* inserts them, as it were; therefore rules of English law applicable to provisions in a bill of lading which *are not* contained in the one in question, would not appear to be relevant.

III.—*The supposed doctrine of British law would not be a rule of decision here even if the terms of the bill of lading admitted of its application.*

If the above construction of the bill of lading is the true one, then what follows addresses itself, not to a real, but to an hypothetical case. Assuming that the contract contains words of exemption from liability, which it is submitted it does not contain, the argument for the respondent is, that the reference to "British law" incorporated all decisions of English Courts expounding that law that had been or might be made. That such was the deliberate and real *intention of* the parties, of course could not be argued, for the idea is altogether absurd, and it must, therefore, be maintained, that without regard to intention or volition the clause must not only be regarded as valid and binding, but receive the widest and most liberal interpretation in favor of the respondent. While it appears to be conceded that a provision in a bill of lading in express terms exempting the ship owner from liability for the wrongful sacrifice of cargo, would be obnoxions to our law and treated as void, it is said it may be expressed, as it were, in cypher, by reference to the whole

body of a foreign law, as interpreted by foreign judicial decisions, and thus concealed may in case of need (to use an expression of photography) be developed, and that it must then be adopted as a rule of decision, because the foreign law would hold it to be valid. To argue against such a proposition would be idle and profitless, the fallacy is obvious, and this device for evading our law has been almost uniformly denounced in judicial decisions, and rightly, for the question is not as to a form of words and patent or latent meaning, but as to *the validity of the stipulation they are alleged to express.*

The *Energia*, 56 Fed. Rep , 124.
Lewisohn *v.* Natl. S. S. Co., 56 Eed. Rep., 602.
Monroe *v.* The *Iowa*, 50 Fed. Rep., 561.
The *Brantford City*, 29 Fed. Rep., 373.
Tne *Guildhall*, 58 Fed. Rep., 796.

That foreign law is allowed extra territorial force only *ex comitate* is a truism, as is also the proposition that no rule of foreign law will be adopted and enforced which is contrary to the public policy of the *lex fori*. If the rule of exemption invoked by the respondent had been expressed in the contract in terms, it must have been pronounced void on the authority of Liverpool, etc.,S. S. Co. *v.* Phœnix Ins. Co., 129 U. S., 397. It is none the less void when deduced from the decisions of a foreign court and set np as a defense. The decision in the case last mentioned settled once for all the questions raised by the argument for the respondent. The contract is governed by our law, which pronounces stipulations in a bill of lading exempting carriers by sea from liability for the negligence or misconduct of masters or mariners to be void. It is truly said in effect that such provisions must be held to have been extorted under duress of circumstances by the carrier whose *quasi* public function imposes common law obligations against the due performance of which he may not contract.

IV.—*The Harter Act.*

It is unnecessary to say that this case must be decided according to the law existing at the date of the contract. But while this self-evident proposition is not denied the above act is referred to as tending to show that the pre-existing law in the premises, as defined in judicial decisions, was regarded as too strict. But this Court has pointed out in the case of the *Delaware* (161 U. S., at p. 470 *et seq.*), that directly the reverse is true. It is there shown that the exactions of carriers by sea expressed in their bills of lading had become intolerable. That the object of the act was to provide a remedy which is to be found in the stern provisions of the first section.

In respect to the object of the act the Court says among other things :

"It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her *cargo*. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between *the cargo and the vessel*, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and *the care and delivery of the cargo*."

It is further said in the argument for the respondent that the act provides that Sections 1 and 4 shall not apply "to the transportation of live animals." But all that can be said of this exception is that it leaves the law in regard to the transportation of live animals as it was before, and thus excludes any favorable inference from the act, which the respondent mistakenly supposes it to afford.

Finally, judgment should be affirmed.

W. W. MacFARLAND,
Of Counsel.